ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	

COMMENTS OF NETSCAPE COMMUNICATIONS CORPORATION ON COMMON CARRIER BUREAU QUESTIONS

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SUMMARY

The Commission and the Joint Board must work to achieve the 1996 Act's universal service objectives without compromising the decentralized, non-regulated, non-governmental and competitive model of Internet administration that has produced the recent geometric growth of this unique and revolutionary medium. Netscape urges the Commission not to undermine competition and technological development by limiting either the services or "functionalities," used for Internet access by schools, libraries and health care providers, or by ignoring the 1996 Act's distinction between "telecommunications services," eligible for subsidy, and enhanced Internet access services.

Question 6

Any attempt by government to dictate the technological functionalities useful for Internet access is doomed to failure, because today's "cutting edge" services and technologies are likely to be obsolete very shortly. Although the Commission and the Joint Board are legitimately concerned with promoting the availability of Internet services and access for America's K-12 classrooms, it would be a misapplication of the 1996 Act, as well as poor policy, to seek to achieve this result by classifying Internet access services as "telecommunications services" eligible for discount under Section 254(h)(1).

Question 7

There is no statutory basis for considering internal school wiring, and more precisely computer LANs, to be "telecommunications services" under the 1996 Act's definition. Moreover, there is simply no way that government (and thus taxpayers), in

today's era of limited budgets, can find the funds and resources on its own to make the necessary infrastructure improvements necessary to move our classrooms into the 21st century. If the Joint Board acts now, on today's assumptions about inside wiring costs, it will also be ignoring short-term marketplace development of wireless "NII/Super-Net" LANs that are far more compatible with the 1996 Act's procompetitive policies.

Question 8

Sections 706 and 708 are vital to making the Internet available to America's schools, libraries and hospitals. Measures possible under these sections to spur Internet development include forbearance from regulation of ISPs and preemption of state public service commission regulation of Internet access services, but do not include subsidization of Internet access services.

Question 9

In order to promote competition, any universal service support payments for schools, libraries and health care providers should (a) be paid to state or local governments, or directly to schools, in lieu of paid to telecommunications providers, and (b) allow decentralized decisions on the appropriate services to which educational institutions will subscribe for purposes of meeting Section 254's objective of making advanced information services available.

Question 10

Services made available to schools under the universal service provisions of the Act can be offered to third-parties without violating the "no resale" prohibition, and cost-based usage fees are permissible for sharing discounted telecommunications services. This approach would facilitate the use of Section 254(h) funds for the creation

of community computer networks, and thus allow the "leveraging" of universal service support for the wider benefit of all Americans.

Question 14

An annual certification by recipients of Section 254 support, attesting that funds were applied to permissible uses and showing the application of universal service subsidies, should be filed with the FCC and posted publicly on the World Wide Web.

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ON COMMON CARRIER BUREAU QUESTIONS

Netscape Communications Corporation ("Netscape"), by its attorneys, hereby responds to the Public Notice ("Notice")[1] released by the Common Carrier Bureau requesting further comment on specific universal service issues in the above-captioned proceeding.[2]

INTRODUCTION

The universal service provisions of the Telecommunications Act of 1996 represent an important means of bringing advanced information services, like the Internet and the World Wide Web, to all Americans, ushering in an era of unprecedented informational literacy and educational opportunity. Achieving this policy goal, which Netscape shares, will take a concerted effort and a public/private partnership of substantial proportion. At the same time, Netscape firmly believes that the Commission and the Joint Board must work to achieve the Act's objectives without compromising

[1] *Federal-State Joint Board on Universal Service*, Public Notice, CC Docket No. 96-45, DA 96-1078 (released July 3, 1996)("Notice").

[2] This document is also available via the Internet's World Wide Web at the following URL address—http://www.technologylaw.com/techlaw/us_supp.html.

the decentralized, non-regulated, non-governmental and competitive model of Internet administration that has produced the recent geometric growth of this unique and revolutionary medium.

Netscape urges the Commission not to undermine competition and technological development by limiting either the services, or "functionalities," used for Internet access by schools, libraries and health care providers. The 1996 Act's distinction between "telecommunications services," eligible for subsidy, and enhanced Internet access services must also be respected—the Joint Board should not ignore the Act's regulatory model, drawn from *Computer II*, in order to do more than Congress has authorized. If regulators work to maximize competition, open standards and cost-based telecommunications pricing, the market will rapidly bring the benefits of the information age to America's schools and classrooms.

DISCUSSION

In accordance with the instructions in the Notice, Netscape's comments follow the order of the questions presented, and restate each question as the heading for the responsive comments.

Schools, Libraries, Health Care Providers

6. Should the services or functionalities eligible for discounts be specifically limited and identified, or should the discount apply to all services?

The services or functionalities eligible for discounts for schools, libraries and hospitals under Section 254(h)(1) of the Act should be identified by the Joint Board, because these provisions are limited to discounts on "telecommunications services" that are within the definition of universal service to be adopted in this proceeding.

This does not mean that the Commission or the Joint Board should limit or specify which services or functionalities schools, libraries and hospitals must use to access the Internet. First, as Netscape pointed out in its comments, any such attempt by government to dictate the technological functionalities useful for Internet access is doomed to failure, because today's "cutting edge" services and technologies are likely to be obsolete very shortly.[3] Second, although the Commission and the Joint Board are legitimately concerned with promoting the availability of Internet services and access for America's K-12 classrooms, it would be a misapplication of the 1996 Act, as well as poor policy, to seek to achieve this objective by classifying Internet access services as "telecommunications services" eligible for discount under Section 234(h)(1).

There is no question that Congress desired to make the Internet a feature of American education, and that the universal service provisions of the Act are a major tool towards that end. Yet the 1996 Act does not repeal, and in fact codifies, the Commission's longstanding *Computer II* distinction between basic telecommunications and "enhanced" information services. Under this settled regulatory paradigm, Internet access is assuredly an "information" service, not a "telecommunications" service.[4] Thus, the Joint Board's power to promote Internet connectivity for classrooms stems from Section 254(h)(2), which requires the Joint Board to assure access to "advanced information services" by educational and medical institutions. The Joint Board should

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[3] Comments of Netscape Communications Corp. at 7-11 (filed April 12, 1996)("Netscape Opening Comments").

[4] Netscape Opening Comments at 14-17.

not—and cannot under the Act and Commission precedent—classify access to the Internet as a basic "telecommunications service" for purposes of Section 254(h)(1).

Netscape is extremely concerned that the Joint Board's interest in making the Internet available to K-12 schools and libraries is creating perverse incentives for classifying Internet access broadly as a "telecommunications" service in order to fit within Section 254(h)(1). This would be a terrible precedent, especially in light of the ancillary issues and obligations (*e.g.*, access charges, interconnection, etc.) applicable to telecommunications carriers under the 1996 Act. As noted below in response to Question 7, there is nothing in the Act suggesting that Congress wanted to overturn or modify the *Computer II* scheme, and certainly nothing suggesting that Section 254 contemplates extending universal service obligations—or support—to enhanced services such as Internet access.[5]

7. Does Section 254(h) contemplate that inside wiring or other internal connections to classrooms may be eligible for universal service support of telecommunications services provided to schools and libraries? If so, what is the estimated cost of the inside wiring and other internal connections?

No. Inside wiring is not a telecommunications service, and consequently has long been treated by the FCC on a detariffed, nonregulated basis. There is no legitimate argument for classifying internal school wiring, and more precisely computer local area networks ("LANs"), as "telecommunications services" under the 1996 Act's definition

[5] Furthermore, subsidies available under Section 254(h)(1), like universal service support to "eligible carriers" in general, are also limited to "telecommunications carriers," thus excluding enhanced service providers such as Internet Services Providers ("ISPs"). If the Commission were to seek to directly subsidize Internet access services for schools, libraries and health care providers, it would therefore distort price competition for Internet access, a market in which local exchange carriers, interexchange carriers, cable system operators and ISPs all compete.

(Section 153(51)). Doing so would plainly be a result-oriented application of the Act, designed to achieve eligibility for federal subsidy totally at odds with the language of the statute and congressional intent.

This in no way diminishes the legitimacy of the public policy underlying this question or of the social importance of "wiring" schools for Internet access. One of the biggest hurdles faced in the task of bringing the Internet to America's classrooms is that many schools, especially older buildings, do not have twisted-pair telephone wiring to individual classrooms, and most lack any wired or wireless LANs for internal networking of school computers. Thus, as the McKinsey & Co. report concluded, the cost of wiring schools for Internet access is massive, clearly exceeding the "telecommunications" costs associated with Internet access services themselves.[6]

But twisting the statutory language to incorrectly wedge inside wiring into Section 254(h) is not the way to approach these costs. Not only would the $6.3 billion (or higher) price tag almost match the entire universal service fund devoted to basic telecommunications services[7]—estimated at $8-12 billion—but such an approach fails to recognize the important need for a public/private partnership in the area of educational technology and Internet. There is simply no way that government (and thus taxpayers), in today's era of limited budgets, can find the funds and resources on its own to make the necessary infrastructure improvements necessary to move our classrooms into the 21st century. In order to make the rich resources of the Internet available to America's

[6] *Connecting K-12 Schools to the Information Superhighway*, McKinsey & Company, at 28 & Exhibit 7 (1996).

[7] *Id.* Exhibit 16.

school children, government will need to look for creative solutions, answers that rely on spurring industry cooperation, in lieu of fashioning ever broader taxes—whether styled as direct taxes (*e.g.*, property tax) for school funding or indirect taxes imposed as universal service "support" mechanisms.

As California's NetDay '96 initiative demonstrated,[8] "wiring" schools is a matter on which private industry has a tremendous interest, and for which it is both willing and able to join forces with government and concerned citizens. For its part, in addition to serving as a major sponsor of NetDay '96, Netscape provides Internet server, client and related software free to educational institutions. Telecommunications carriers (from RBOCs to the cable television industry) are prepared to join this effort by making inside wiring and Internet access services available free to schools. The Commission should aggressively pursue and foster these private industry initiatives. Netscape applauds the Clinton Administration for its vision of achieving Internet access in every classroom by the year 2000, and looks forward to playing a major role in this watershed transition in American education. We strongly caution the Joint Board, however, against trying to achieve this policy goal by taking "creative," and ultimately unsustainable, liberties with the specific universal service parameters established by Congress.

Classifying inside wiring as a communications service may also be unnecessary. The Commission has recently proposed a new class of Part 15 LANs, known as "NII/SuperNet," that would allow for wireless computer networks using low-cost

[8] http://www.netday96.com

unlicensed communications devices. Once spectrum for these devices is allocated, there is every reason to believe that the proliferation of wireless LANs will be rapid, and that prices for NII/SuperNet devices will, in short order, offer an extremely economic approach to "wiring" K-12 classrooms. Thus, if the Joint Board acts now, on today's assumptions about inside wiring costs, it may well be ignoring a far more promising approach, one that is compatible with the 1996 Act and its procompetitive policies.

8. To what extent should the provisions of Sections 706 and 708 be considered by the Joint Board and be relied upon to provide advanced services to schools, libraries and health care providers?

Sections 706 and 708 are vital to making the Internet available to America's schools, libraries and hospitals because they permit the Joint Board to act directly on Internet access and services, without regard to the limitation in Section 254(h)(1) to "telecommunications services." As Netscape discussed in its comments, these provisions define "advanced telecommunications capability" and "telecommunications industry," respectively, to include enhanced and data services.[9]

The obvious concerns underlying this questions are (a) whether the Joint Board can rely on Sections 706 and 708 as a legal matter and (b) whether Sections 706 and 708 support funding or subsidization of services for schools, libraries and health care providers. The first of these is really a non-issue because the Joint Board is permitted to recommend to the Commission universal service actions that are within the *Commission's* authority, and the FCC is clearly entitled to take Sections 706 and 708 into consideration when deciding on universal service policies under Section 254.

[9] Netscape Opening Comments at 22-25

As to funding, Section 708 by its terms permits funding to states for the direct benefit of schools—albeit by the National Educational Technology Funding Corporation, not the FCC.[10] Section 706, however, speaks in terms of "removing barriers to infrastructure investment" and "promoting competition" in the marketplace, rather than universal service support payments. There are a variety of measures that would facilitate the deployment of Internet connectivity at America's schools consistent with Section 706. These include forbearance from regulation of ISPs and preemption of state public service commission regulation of Internet access services, *see* Netscape Opening Comments at 20-21,[11] in addition to other regulatory methods the Commission could develop for spurring the growth of the Internet. Indeed, defining Internet access as jurisdictionally interstate, and thus preempting state jurisdiction, is particularly crucial if the Joint Board decides to classify Internet as a "telecommunications" service for discount purposes, because the underlying telecommunications facilities used by Internet providers—and by schools to connect directly to the Internet—are physically almost always intrastate.[12]

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[10] The provision in Section 708(a)(1)(C) for NETFC funding for "interactive high capacity networks" for schools and to promote "public-private ventures" for educational technology reinforces the conclusion that Section 254 was not intended by Congress to serve as a vehicle by which the Joint Board subsidizes inside wiring. In contrast, proposals such as that of the National Public Telecomputing Network for Joint Board funding of "community computer networks" can fit within the statutory scheme because the funds involved would be directed toward the provision of access to advanced information services, not internal school LANs, under Section 254(h)(2).

[11] *See also* Joint Comments of Netscape Communications Corporation, Voxware, Inc. and InSoft, Inc., RM-8775 (filed May 8, 1996)(proposing a three-pronged "forbear, preempt and promote" policy toward the Internet and Internet communications).

[12] Netscape Opening Comments at 20.

It does not appear that the distribution of universal service support funds is permissible under the language of Section 706. In any event, Netscape believes that extending subsidies for Internet access, even if permitted, would be extremely unwise. Switched telephony "support mechanisms" are a bad model for the Internet, which is a different, decentralized medium that operates in a highly competitive marketplace, especially in light of the broader deregulatory environment created by the 1996 Act. Unlike "POTS," Internet access has not been subject to the economic distortions of monopoly or government-mandated subsidization to fashion a subsidy system now, under the guise of extending the Internet to educational and medical institutions, would threaten government economic entanglement with the rapidly changing Internet on an unprecedented scale. As Commissioner Chong has observed, the Internet has been successful in large part because "government has kept its mitts off," a principle which merits reaffirmation in this proceeding.

This does not mean, however, that Section 706's authority should not be considered by the Joint Board—Section 706 is not an invitation to "do nothing." To the contrary, the fact the Commission is required to take direct regulatory action under Section 706 by 1998 if broadband, interactive communications capabilities are not deployed to "all Americans," especially educational institutions, must be an integral part of the Joint Board's consideration.

Read consistently with Section 254(h), this provision indicates that Congress desired to have leave as much of the provision of advanced services for schools as possible to the marketplace. Thus, Section 706 can be used to stimulate market opportunities for ISPs, OSPs, small businesses and other potential providers of Internet

access for educational institutions with a range of measures—from direct financial assistance, to acceleration of licensing timeframes, to creation of "build out" incentives for provision of broadband Internet access to schools—that are not available to the Joint Board under Section 254. Moreover, the Joint Board can recommend such actions to the Commission without entering into the legally tenuous ground, discussed in response to Questions 6 and 7, of attempting to extend universal service support obligations beyond "telecommunications carriers" to information service providers and ISPs.

9. How can universal service support for schools, libraries and health care providers be structured to promote competition?

In order to promote competition, any universal service support payments for schools, libraries and health care providers should be (a) paid to state or local governments, or directly to schools, in lieu of paid to telecommunications providers, and (b) allow decentralized decisions on the appropriate services to which educational institutions will subscribe for purposes of meeting Section 254's objective of making advanced information services available.

This essentially means that the Commission should utilize a "voucher" system for Section 254(h)(1) discounts, in order to sever any link between specific carriers and universal service, thus creating an incentive for providers to price-compete to serve K-12 schools. Furthermore, the Commission should not select any services, technologies or "functionalities" at a national level for inclusion in Section 254(h)(2), because such determinations would interfere in the burgeoning competition for the development of larger bandwidth services for Internet access. Netscape especially believes that the Joint Board should not fool itself into thinking that competition and technological

innovation will be fostered if the Commission selects "functionalities" (instead of services) necessary for Internet access, because there is a close correlation between telecommunications functionalities (*e.g.*, data speed, protocols, bandwidth, etc.) and existing services. By fashioning a system whereby such determinations can be made at a local level, the users themselves will have the flexibility to go where the market moves and maintain Internet access for schools, libraries and hospitals at state-of-the-art levels.

10. Should the resale provision in Section 254(h)(3) be construed to prohibit only the resale of services to the public for a profit, and should it be construed so as to permit end user cost based fees for services? Would construction in this manner facilitate community networks and/or aggregation of purchasing power?

Section 254(h)(3) precludes the resale of "telecommunications services and network capacity" made available to public institutional telecommunications users. Because Commission precedent since the landmark *Resale and Shared Use* proceeding has considered resale to be the offering of telecommunications services to the public for a profit (as opposed to cost-based "sharing" of services), this same rule should be applied under Section 254(h). Thus, services made available to schools under the universal service provisions of the Act could be offered to third-parties at cost-based usage fees, so long as there were no profit involved.

This approach would facilitate the use of Section 254(h) funds for the creation of community computer networks, and thus allow the "leveraging" of universal service support for the wider benefit of all Americans. It is important to allow schools and health care providers to aggregate their demand in efficient ways, which of course includes the need to order services for "peak" periods and offset costs for "slack" periods, such as summer vacations, when systems have significant excess capacity.

Moreover, by adding local governments, businesses and citizens to the aggregated purchasing power of schools, competition to bring Internet access directly to rural and insular communities will be increased. Allowing sharing of Section 254(h)(1) resources is thus a good way to pursue universal service policy in a way that maintains market competition.

The text of Section 254(h)(3) does not offend this interpretation. Although services may not be "sold . . or otherwise transferred" by users, there has been no suggestion that schools should be permitted to sell or transfer any of the telecommunications services obtained under Section 254(h)(1) at a discounted basis. Rather, community networks (connecting all schools and hospitals) would receive universal service funding, including Section 254(h)(1) discounts, apply these funds to underwrite part of the costs of creating and running the network, and offer access to the network to others (parents, local businesses, etc.) in addition to serving the advanced communications needs of public institutions. Community network users would thus be sold computer network services, not the discounted telecommunications services made available under Section 254(h).

In sum, the construction suggested in this question may not be necessary to support creation of community networks, since there need not be any sale or resale of discounted services, but it would certainly facilitate this approach by removing possible legal uncertainty.

11. If the answer to the first question in number 10 is "yes," should the discounts be available only for the traffic or network usage attributable to the educational entities that qualify for the Section 254 discounts?

The Section 254(h)(1) discounts apply to "services," not traffic or network usage. Once the Joint Board concludes that non-profit usage fees are permissible without violating the "no resale" prohibition, there is no reason to limit the telecommunications discount to traffic specifically identifiable to educational institutions.

Plainly, the Joint Board must respect the congressional determination that K-12 schools not use the universal service provisions of the Act to provide subsidized services to third-parties, in turn inflating the universal service contributions required of telecommunications carriers. In the community network context, however, discounts would be applicable for data telecommunications facilities connecting the local LAN and the Internet backbone, typically via a T1 or other dedicated service. Therefore, not only would it be technically difficult and costly in a shared usage environment to monitor traffic originating from certain users, but it is unnecessary to do so in order to comply with Section 254's resale prohibition. In these circumstances the educational entity or community network is not selling or reselling the discounted telecommunications service, but rather Internet access (an enhanced information service) that uses the telecommunications "pipe" as an input. Consequently, the Section 254 discount can be "passed through" to the benefit of non-educational users of the network without violating the resale prohibition itself.

13. Should discounts for schools, libraries and health care providers take the form of direct billing credits for telecommunications services provided to eligible institutions?

Yes. A direct billing credit system, like a "voucher" approach, allows universal service discounts to facilitate a competitive market for meeting the telecommunications needs of schools, libraries and health care providers. *See* Question 9.

14. If the discounts are disbursed as block grants to states or as direct billing credits for schools, libraries and health care providers, what, if any, measures should be implemented to assure that the funds allocated for discounts are used for their intended purposes?

Intrusive federal oversight of states and schools is unnecessary. Politicians, school officials and parents all share an interest in making advanced services available to classrooms, and there is little likelihood of a user "converting" universal service funds for a non-communications purpose. Therefore, an annual certification by the appropriate recipient of the Section 254 support, attesting that the funds were applied to permissible uses, should suffice, subject to Commission or Justice Department investigation in the case of fraud or other criminal activity.

Netscape also suggests that these certifications be made available publicly, via the Internet's World Wide Web. For instance, if each recipient of subsidized service under Section 254(h) were required to post to the Internet a document showing its use and allocation of subsidy payments, it would not only make compliance and auditing much easier, but provide an easy way for educators and hospital administrators to share ideas and compare/contrast different approaches for applying universal service funds.

CONCLUSION

The Joint Board and the Commission should implement the 1996 Act's universal service provisions for schools, libraries and hospitals without undermining the settled distinction between telecommunications services and advanced information services like the Internet. Achieving this objective requires a substantial, joint public/private effort, in which Netscape will continue to be fully engaged.

Respectfully submitted,

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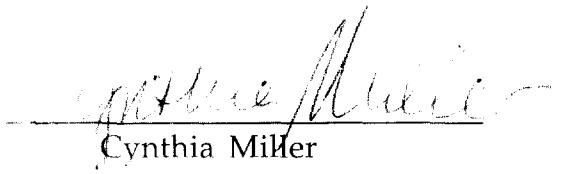
Dated: August 2, 1996.

CERTIFICATE OF SERVICE

I, Cynthia Miller, do hereby certify on this 2nd day of August, 1996, that I have served a copy of the foregoing document via first class mail, postage prepaid, to the parties below:



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